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No. 85-157

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In the Supreme Court of the United States

OCTOBER TERM, 1985

GARY JACKSON, a/k/a ROE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner may now contest the admission of co-conspirator statements on Confrontation Clause grounds although he made no such objection at trial.

2. Whether petitioner is entitled to reversal of his convictions under the Compulsory Process Clause or the Confrontation Clause because the trial judge refused to issue a writ of habeas corpus ad testificandum for an incarcerated witness sought by the defense, where petitioner did not apply for the writ until after trial had commenced and has not shown that the witness would have given material testimony favorable to the defense.

3. Whether a trial court is always required, before permitting testimony regarding co-conspirator statements, to conduct a hearing outside the presence of the jury and to make a determination that the threshold facts required for admission have been shown.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 7

Conclusion 17

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 8

Ballard v. *Spradley*, 557 F.2d 476 10

Hernandez v. *Estelle*, 674 F.2d 313 9

Itel Capital Corp. v. *Dennis Mining Supply & Equipment Co.*, 651 F.2d 405 10

Jackson v. *Denno*, 378 U.S. 368 ..... 15, 16

Lawn v. *United States*, 355 U.S. 339 8

Llach v. *United States*, 739 F.2d 1322 13

Lockett v. *Blackburn*, 571 F.2d 309, cert. denied, 439 U.S. 873 9

Luce v. *United States*, No. 83-912 (Dec. 10, 1984) 17

Motes v. *United States*, 178 U.S. 458 9

Peppard v. *United States*, 314 F.2d 623 10

Sims v. *Georgia*, 385 U.S. 538 15

Strickland v. *Washington*, No. 82-1554 (May 14, 1984) 11

Page

Cases—Continued:

United States v. *Alvarez*, 755 F.2d 830 12

United States v. *Bagley*, No. 84-48 (July 2, 1985) 11

United States v. *Caudle*, 758 F.2d 994 13

United States v. *Gibbs*, 739 F.2d 838 8

United States v. *Inadi*, cert. granted, No. 84-1580 (May 28, 19859 7-8

United States v. *James*, 590 F.2d 575, cert. denied, 442 U.S. 917 ..... 5, 11, 12, 14

United States v. *LeAmous*, 754 F.2d 795, cert. denied, No. 84-6652 10

United States v. *Lisotto*, 722 F.2d 85, cert. denied, 466 U.S. 905 8

United States v. *Lovasco*, 431 U.S. 783 8

United States v. *Lurz*, 666 F.2d 69, cert. denied, 455 U.S. 1005 8

United States v. *Monaco*, 700 F.2d 577 13

United States v. *Montemayor*, 703 F.2d 109, cert. denied, 464 U.S. 822 13

United States v. *Norton*, 755 F.2d 1428 13

United States v. *Prows*, 728 F.2d 1398 14

United States v. *Radeker*, 664 F.2d 242 14

United States v. *Reed*, 726 F.2d 570, cert. denied, No. 83-1912 (Oct. 1, 1984) 13

United States v. *Richardson*, 694 F.2d 251 15

Page

Cases—Continued:

United States v. *Valenzuela-Bernal*, 458 U.S. 858 ..... 10, 11

Washington v. *Texas*, 388 U.S. 14 11

Constitution, statutes and rules:

U.S. Const. Amend. VI (Confrontation Clause) 6, 7, 8, 10

7 U.S.C. 2024(b) 2

18 U.S.C. 371 1

18 U.S.C. 3501(a) 15

21 U.S.C. 841(a)(1) 2

21 U.S.C. 843(b) 2

21 U.S.C. 843(c) 2

28 U.S.C. 2241(c)(5) 9

Fed. R. Crim. P. :

Rule 16(a) 7

Rule 16(a)(1)(A) 6, 7

Rule 17(b) 9, 10

Fed. R. Evid. :

Rule 103(a)(2) 17

Rule 404(b) 7

Rule 801(d)(2)(E) 5, 7, 12, 13, 16

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 757 F.2d 1486.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1985. A petition for rehearing was denied on May 30, 1985 (Pet. App. 12). The petition for a writ of certiorari was filed on July 26, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of North Carolina, petitioner was convicted on one count of conspiracy to possess and distribute marijuana and to acquire and possess illegal food stamps, in violation of 18 U.S.C. 371. He was also convicted

of unauthorized acquisition of food stamps, in violation of 7 U.S.C. 2024(b); possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1); distribution of marijuana, in violation of 21 U.S.C. 841(a)(1); and use of a telephone to facilitate the sale of marijuana, in violation of 21 U.S.C. 843(b) and (c) (J.A. 3, 6-10). He was sentenced to concurrent five-year terms of imprisonment on the conspiracy count and the two substantive marijuana offenses; a concurrent four-year term on the telephone facilitation count; and a four-year term on the food stamp acquisition count, to run consecutively to the sentence imposed on the conspiracy count. A two-year special parole term was also imposed on the marijuana possession counts. The court of appeals affirmed (Pet. App. 1-11).[1]

1. The pertinent facts are summarized in the opinion of the court of appeals (Pet. App. 1). On the conspiracy count, the government's evidence consisted, in part, of the out-of-court statements of co-conspirators, particularly petitioner's nephew, Preston Jackson (hereinafter Preston), implicating petitioner in deals to sell drugs and guns to government undercover agents in exchange for food stamps. It showed that on March 15, 1983, two undercover agents met Preston at a restaurant. They informed him that they had a large quantity of food stamps for sale and that they were interested in purchasing guns and marijuana (J.A. 101-104).[2] Preston made a phone call, returned, and informed the agents that petitioner had a revolver for sale (J.A. 105). After the agents transported Preston to petitioner's residence, he went into the house, returned with the revolver,

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[1]Petitioner's indictment named Michael Thompson as an unindicted co-conspirator. After Thompson was indicted separately, his case was joined for trial with petitioner's. Thompson was convicted of conspiracy and placed on probation.

[2]"J.A." is the abbreviation for the Joint Appendix in the court of appeals.

and stated that petitioner was willing to sell it for $260 worth of food stamps (J.A. 106). After some haggling, the agents agreed on the original price, provided that petitioner include some ammunition, which Preston also obtained from petitioner's house. On this occasion, Preston also informed the agents that petitioner did not want to meet too many people and that all dealings would have to be made through him (J.A. 109).

After the sale was completed, co-defendant Michael Thompson approached the car in which the agents were sitting with Preston, who reassured the agents that Thompson was "another relative." When Thompson asked one of the agents whether he was interested in purchasing two shotguns for $250 in food stamps, the agent suggested that they do business in a less public place because several other individuals were milling around the car (J.A. 108, 188-189). Thompson agreed, noting that the shotguns were actually at another location (J.A. 108, 190). At Thompson's instructions, the agents followed him by car to another house, but the occupant was not at home. Thompson then advised the agents that he would have the shotguns brought to petitioner's house within the hour (J.A. 110, 192). In accordance with Thompson's instructions, the agents returned to petitioner's residence. Thompson and Preston, who was carrying two shotguns, left the house through the front door. The agents then purchased the weapons with $250 in food stamps (J.A. 129).

On March 31, 1983, the agents and Preston were at the home of petitioner's sister, who informed them that petitioner wished to speak with them. When she phoned petitioner and put one of the agents on the telephone, petitioner stated that he wanted to buy more food stamps and asked how many they had. The agent responded that they could get as many as he wanted. Petitioner then asked a confederate how many he wanted; the response was $800 in food

stamps for $400 in cash. When the agent asked whether petitioner had any guns or marijuana for sale, petitioner responded that he had the marijuana but would need to check around for guns (J.A. 140-141). Petitioner then requested that the agents come to his house the next morning (J.A. 140-141).

When the agents arrived at petitioner's residence without Preston, petitioner inquired as to his whereabouts. When the agents stated that Preston was not with them, petitioner spontaneously responded, "I don't mess with food stamps; I don't mess with guns; I just don't get involved in that sort of thing" (J.A. 143-144). As the agents began to leave, however, petitioner stated that he knew a man who had some guns and that he would try to have him there the next day at noon (J.A. 145).

The following day the agents returned. Preston emerged from petitioner's house and informed them that petitioner had marijuana for sale but would take only cash in payment. Petitioner then left the house and informed the agents that he had been unable to contact the individual with guns for sale (J.A. 147-148).

On April 7, 1983, petitioner's sister contacted one of the agents and told him that petitioner wished to speak with him. The agent telephoned petitioner and, in a tape recorded conversation, negotiated the sale of $1,000 in food stamps for $500 in cash (J.A. 149-150; GX 8). Petitioner informed the agent that he planned to make his profit—$50 to $100—as the middleman in the sale to the buyer. The conversation ended with petitioner stating that he would telephone the buyer (J.A. 261-264). When the agent again contacted petitioner, he indicated that the buyer was at his home and that they should come over. He also offered to sell the agent a quarter pound of marijuana in exchange for an additional $100 in food stamps (J.A. 206-208). When the

agent arrived at petitioner's residence, co-defendant Thompson emerged and motioned them toward a shed. Inside, Thompson displayed a quarter pound of marijuana and $500 in cash to pay for $1,000 in food stamps (J.A. 213-214). The agent then made the exchange, giving Thompson $1,040 in food stamps for $520 in cash, and $400 in food stamps for a quarter pound of marijuana (J.A. 214-215).

2. Prior to trial, petitioner filed a motion for a bill of particulars requesting, inter alia, the names and identities of any and all persons alleged to have conspired with him and a statement as to the manner or means by which the conspiracy was alleged to have occurred (J.A. 19). The motion was denied (J.A. 37). In addition, relying upon the decision of the Fifth Circuit in *United States* v. *James,* 590 F.2d 575 (1978) (en banc), cert. denied, 442 U.S. 917 (1979), petitioner filed a motion seeking an order directing that no statement of alleged co-conspirators be introduced into evidence without a prior hearing out of the presence of the jury on the question whether the statement fulfilled the threshold requirement of Fed. R. Evid. 801(d)(2)(E) that it be made by a co-conspirator and fall within the scope of the conspiracy. A magistrate denied the motion, observing that the Fourth Circuit had not adopted the procedures specified in *James* and that a trial court could hear evidence bearing upon the admissibility of a co-conspirator's statements either in or out of the presence of the jury (J.A. 23).[3] Both motions were renewed before the trial judge and were again denied (J.A. 70, 72).

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[3]The magistrate erroneously assumed that the *James* court held that hearings on the admissibility of the statements of co-conspirators must be held out of the presence of the jury. But see pages 12-13, *infra.*

After learning that the government intended to introduce the statements of Preston Jackson, who had previously been convicted by the trial judge for his participation in the scheme, petitioner also moved for production of the statements to be introduced and claimed that failure to furnish them would infringe upon his Sixth Amendment right to confrontation (J.A. 80-83). This motion was also denied (J.A. 83-84).

The jury was empaneled on February 21, 1984. On February 24, 1984, petitioner filed a petition for issuance of a writ of habeas corpus ad testificandum seeking the presence of Preston Jackson, who was then incarcerated as the result of his conviction (J.A. 50). On February 27, 1984, after the trial had begun, petitioner's counsel again objected to the introduction of Preston's statements and renewed his motion for issuance of the writ. During argument on the motion, he averred that when he had sought the prosecutor's assistance in obtaining Preston's presence at trial, the prosecutor had refused and had informed him that the proper procedure was to file a petition for a writ of habeas corpus ad testificandum with the district court (J.A. 72). The trial judge observed that the case had been calendared for trial for a long time and that it was late to be filing a motion for a writ of habeas corpus ad testificandum. Although the court did not issue the writ, it sustained "at [that] point" petitioner's objection to the introduction of Preston's statements as those of a co-conspirator (J.A. 103, 104). However, the court admitted those statements following foundational testimony by one of the FBI undercover agents (J.A. 105).

3. On appeal, petitioner maintained, inter alia, that the district court erred in failing to conduct an out-of-court hearing on the admissibility of Preston's statements; that the government violated Fed. R. Crim. P. 16(a)(1)(A) by failing to furnish him with Preston's out-of-court statements prior to trial; and that the government violated his

right to compulsory process by failing to produce Preston so that he could testify at trial. The court of appeals held that under its precedents the trial judge need not conduct a hearing out of the presence of the jury or make express factual findings before admitting the statements of a co-conspirator, and that, because the petition for a writ of habeas corpus ad testificandum was not filed until after the trial had commenced, the district judge had acted within his discretion in failing to issue the writ. However, the court of appeals also held that Fed. R. Crim. P. 16(a)(1)(A), which requires the government to furnish a defendant as part of pretrial discovery copies of statements that he made "in response to interrogation by any person then known to the defendant to be a government agent," also requires disclosure of statements of co-conspirators made during the course of a criminal enterprise (Pet. App. 4-5). Nonetheless, because petitioner failed to demonstrate any prejudice resulting from this "discovery violation," the court of appeals affirmed the conviction (Pet. App. 6, 7).[4]

ARGUMENT

1. Petitioner contends (Pet. 7-8) that the introduction of Preston Jackson's statements under the co-conspirator rule, Fed. R. Evid. 801(d)(2)(E), violated the Confrontation Clause of the Sixth Amendment because it was not shown that Preston was unavailable to testify. Although this question is the same as that presented in *United States* v. *Inadi,*

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[4]The court of appeals also rejected (Pet. App. 2-3) petitioner's claims that the district court erred in admitting Preston's statements because they were made before the date on which the conspiracy was alleged in the indictment to have begun, and that the district court failed to give adequate limiting instructions as to the use to which the jury could put evidence of prior bad acts admitted under Fed. R. Evid. 404(b).

Judge Wilkinson filed a separate opinion disagreeing with the majority's holding that Fed. R. Crim. P. 16(a) requires discovery of co-conspirator statements (Pet. App. 8-11).

cert. granted, No. 84-1580 (May 28, 1985), an affirmance in *Inadi* would not alter the outcome here. In the courts below, petitioner never challenged the admission of the co-conspirator statements on the Confrontation Clause grounds asserted by Inadi but instead made a very different Sixth Amendment argument. He contended that his rights to compulsory process and confrontation were denied because the United States Attorney and the court failed to arrange for Preston Jackson's presence at trial (see Appellant's Br. 33-38). Thus, petitioner's Confrontation Clause claim, unlike that in *Inadi,* did not concern the *admission* of Preston Jackson's out-of-court statements. Instead, it was solely concerned with securing Preston's *presence in court.* Neither of the lower courts understood petitioner to have raised the *Inadi* issue, and Fourth Circuit precedent on this question is unsettled. Compare *United States* v. *Lisotto,* 722 F.2d 85, 88 (4th Cir. 1983), cert. denied, 466 U.S. 905 (1984), with *United States* v. *Lurz,* 666 F.2d 69, 80-81 (4th Cir. 1981), cert. denied, 455 U.S. 1005 (1982). Thus, petitioner's failure to object to the admission of Preston Jackson's statements on Confrontation Clause grounds may well have affected the trial court's ruling.

Even the circuit that decided *Inadi* has held that a defendant who wishes to raise a Confrontation Clause challenge to the admission of a co-conspirator statement must expressly object on that ground at trial. *United States* v. *Gibbs,* 739 F.2d 838 (3d Cir. 1984) (en banc). Because petitioner made no such objection at trial (and indeed did not even raise the issue on appeal), he is barred from raising it now. See, *e.g., United States* v. *Lovasco,* 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 147 n.2 (1970); *Lawn* v. *United States,* 355 U.S. 339, 362 n.16 (1958).

2. Petitioner renews his claim (Pet. 9-13) that he was denied his Sixth Amendment rights of confrontation and compulsory process by the failure of the prosecutor and the

trial judge to obtain Preston Jackson's presence at trial as a possible defense witness. This claim was properly rejected by the court below.

In the first place, the prosecutor did not, as petitioner now maintains (Pet. 12), refuse to assist him. Rather, as petitioner's counsel explained to the trial judge (J.A. 103), the prosecutor correctly advised him that the proper procedure for obtaining the presence of someone incarcerated in federal prison was to request issuance of a writ of habeas corpus ad testificandum by the district court (*ibid.*).[5] See 28 U.S.C. 2241(c)(5); see also Fed. R. Crim. P. 17(b) (authorizing district courts to issue subpoenas to defense witnesses upon satisfactory showing that the defendant is unable to pay witness fee and that presence of witness is necessary to an adequate defense).

Nor did the district court act improperly in declining to issue the writ. The decision whether to issue a writ of habeas corpus ad testificandum, like the decision whether to issue a

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[5]This case bears no resemblance to the authorities upon which petitioner relies (Pet. 11) to support his claim that the government improperly failed to arrange for Preston's presence at trial. In *Motes* v. *United States*, 178 U.S. 458 (1900), this Court held that the out-of-court statements of a government witness were improperly introduced because the witness was unavailable to testify due to the negligence of government officials in permitting him to escape. In *Hernandez* v. *Estelle*, 674 F.2d 313 (5th Cir. 1981), the district court found that the state had deliberately concealed a material witness. And in *Lockett* v. *Blackburn*, 571 F.2d 309 (5th Cir.), cert. denied, 439 U.S. 873 (1978), the prosecution procured the absence of two potential defense witnesses from the scene of the trial by furnishing them with airline tickets and cash. The court held that the "deliberate concealment of a named eyewitness whose testimony would admittedly be material constitutes a prima facie deprivation of due process" (*id.* at 313 (footnote omitted)).

There is nothing remotely similar in this case. To the contrary, Preston's absence was the result of the failure by defense counsel to file a timely request for a writ of habeas corpus ad testificandum that demonstrated the materiality of the witness's expected testimony.

subpoena requested by the defense under Fed. R. Crim. P. 17(b), is a matter committed to the sound discretion of the district court. See, *e.g.*, *United States* v. *LeAmous*, 754 F.2d 795, 798 (8th Cir. 1985), cert. denied, No. 84-6652 (June 3, 1985); *Ballard* v. *Spradley*, 557 F.2d 476, 480 (5th Cir. 1977). When a motion for issuance of an ad testificandum writ is belatedly filed and fails to specify what exculpatory testimony the potential witness would furnish, denial of the motion is within the district court's discretion. See *Itel Capital Corp.* v. *Dennis Mining Supply & Equipment Co.*, 651 F.2d 405, 407 (5th Cir. 1981); *Peppard* v. *United States*, 314 F.2d 623, 625 (8th Cir. 1963). Here, as the court of appeals observed (Pet. App. 7), petitioner either knew or should have known of any possible exculpatory testimony that Preston Jackson might be able to give, especially since he had been tried and convicted prior to the beginning of petitioner's trial. Nonetheless, petitioner did not file the motion until after the commencement of his own trial and did not specify what the anticipated exculpatory testimony would be.[6]

There is also no merit to petitioner's argument (Pet. 12) that where the rights to confrontation and compulsory process are allegedly violated it is unnecessary to demonstrate on appeal that the missing witness would have provided exculpatory testimony. As the Court explained in *United States* v. *Valenzuela-Bernal*, 458 U.S. 858 (1982), in rejecting the similar claim that the deportation by the government of a potential witness violated the defendant's right to compulsory process under the Sixth Amendment (*id.* at 867 (emphasis added; footnote omitted)):

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[6]The motion merely stated in conclusory terms that Preston Jackson "is a necessary and material witness in the proceeding" and that "[t]he [d]efendant * * * cannot proceed to trial in absence of the said witness" (J.A. 50).

> the Sixth Amendment does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses: it guarantees him "compulsory process for obtaining *witnesses in his favor.*" U.S. Const., [Amend. VI] (emphasis added). In *Washington* [v. *Texas,* 388 U.S. 14 (1967)] this Court found a violation of this Clause of the Sixth Amendment when the defendant was arbitrarily deprived of "testimony [that] would have been *relevant* and *material,* and . . . *vital* to the defense." 388 U.S., at 16 (emphasis added). This language suggests that respondent cannot establish a violation of his constitutional right to compulsory process merely by showing that deportation of the passengers deprived him of their testimony. ***He must at least make some plausible showing of how their testimony would have been both material and favorable to his defense.***

See also *id.* at 872-873 (a violation of the compulsory process clause requires some showing that the evidence would be both favorable and material to the defense); *United States* v. *Bagley,* No. 84-48 (July 2, 1985), slip op. 13-14; *Strickland* v. *Washington,* No. 82-1554 (May 14, 1984), slip op. 24-26. Here, as in *Valenzuela-Bernal,* "the [defendant] made no effort to explain what material, favorable evidence the [missing witness] would have provided for his defense" (458 U.S. at 874). Therefore, regardless of the reasons for Preston Jackson's absence at trial, petitioner is entitled to no relief.

3. Relying upon the decision of the Fifth Circuit in *United States* v. *James, supra,* petitioner claims (Pet. 13-18) that before the out-of-court statements of a co-conspirator may be admitted into evidence, a trial judge is invariably obligated to conduct an evidentiary hearing out of the presence of the jury and to determine whether the necessary foundational requirements have been met. This

contention is also without merit and, even if correct, would involve a point of procedure that is now immaterial and at most harmless error in petitioner's case.

a. In order to permit the admission of the statements of co-conspirators under Fed. R. Evid. 801(d)(2)(E), the government must establish by independent evidence (1) that a conspiracy existed; (2) that the defendant and the declarant were both members of the conspiracy; and (3) that the statement was made in the course of and in furtherance of the conspiracy. See, *e.g., United States* v. *Alvarez,* 755 F.2d 830, 855 (11th Cir. 1985). In *James,* 590 F.2d at 582, the Fifth Circuit, exercising its supervisory power, held that, to avoid the risk of unfair prejudice to the defendant or the danger of a mistrial, the preferable procedure is for the government to establish the necessary foundation under Fed. R. Evid 801(d)(2)(E) prior to introducing the statements of the co-conspirator. The *James* court made clear, however, that the preferred order of presenting evidence was not mandatory, and that a trial court, in the exercise of its discretion, may permit the introduction of co-conspirator's statements subject to subsequent connection and a determination by the court that the foundational requirements have been fulfilled.[7] In addition, the *James* court did not require that the foundational evidence be presented out of the presence of the jury. See 590 F.2d at 578-582; *id.* at 585 (Tjoflat, J., concurring) (an objective of the en banc majority was to eliminate the requirement for a "minitrial" outside presence of jury to determine admissibility of

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[7]In particular, the *James* court held that (590 F.2d at 582):

> The district court should, whenever reasonably practicable, require the showing of a conspiracy and of the connection of the defendant with it before admitting declarations of a co-conspirator. If it determines it is not reasonably practical to require the showing to be made before admitting the evidence, the court may admit the statement subject to being connected up.

statements of co-conspirators); *United States* v. *Montemayor,* 703 F.2d 109, 117 (5th Cir.), cert. denied, 464 U.S. 822 (1983) (rejecting claim that defendant had right to hearing out of presence of the jury to determine whether necessary foundation established for admission of statement of co-conspirator). Other courts of appeals have likewise neither forbidden trial judges from admitting co-conspirator statements subject to the subsequent satisfaction of the foundational requirements nor required the predicate to be established out of the presence of the jury. See, *e.g., United States* v. *Caudle,* 758 F.2d 994, 998 (4th Cir. 1985); *United States* v. *Norton,* 755 F.2d 1428, 1431 (11th Cir. 1985); *Llach* v. *United States,* 739 F.2d 1322, 1327-1329 (8th Cir. 1984); *United States* v. *Reed,* 726 F.2d 570, 580 (9th Cir. 1984), cert. denied, No. 83-1912 (Oct. 1, 1984); *United States* v. *Monaco,* 700 F.2d 577, 581 (10th Cir. 1983).

In the present case, the trial judge, who had previously presided at Preston Jackson's own trial and had thus already heard evidence bearing upon the conspiracy (see J.A. 73, 102), plainly did not exceed the latitude afforded by these authorities in the procedure he followed in admitting his statements. Although he made no finding in haec verba that the foundational requirements of Fed. R. Evid. 801(d)(2)(E) had been met, this was the import of his rulings. Thus, although the trial judge initially excluded testimony by an FBI agent concerning the statements, immediately after the agent testified that Preston had taken him and an associate to persons, including petitioner, who would trade guns for food stamps, the trial judge reversed this ruling and admitted the testimony regarding the co-conspirator statements. In this context, the ruling was

plainly the result of a determination that the necessary foundation had been established by the evidence *aliunde*.[8]

In any event, the chief way in which the *James* court's rule is intended to protect defendants is by preventing prejudice in the event that the requisite foundation is not ultimately laid. See *James*, 590 F.2d at 581-582. Here, however, as the court below observed (Pet. App. 3), the government presented abundant and undisputed evidence demonstrating the existence of a conspiratorial relationship between petitioner and Preston Jackson. Not only did it show that the March 1983 transactions arranged by the latter were consummated outside petitioner's residence, which was the apparent source of the firearms bartered for the food stamps, but that on subsequent occasions the undercover agents had direct dealings with petitioner during which they negotiated the sale of food stamps by telephone and personal contact. Given the compelling nature of this evidence, it is beyond dispute that a sufficient foundation was established, and there is no reason to believe that petitioner would have benefitted in the least if the district court had adopted different procedures. Indeed, it is significant that petitioner makes no claim to the contrary. See, *e.g.*, *United States* v. *Prows*, 728 F.2d 1398, 1401 (11th Cir. 1984) (any

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[8]This case is thus clearly distinguishable from the authorities upon which petitioner relies (Pet. 13-14) to support his claim that the procedure the trial judge followed in admitting the co-conspirator statements was defective because of his failure to make the necessary preliminary findings of fact. In *United States* v. *Radeker*, 664 F.2d 242 (10th Cir. 1981), the trial judge made no determination whatsoever that the threshold requirements had been met for the introduction of a co-conspirator's out-of-court statements and left determination of the matter to the jury. In this case, by contrast, it is apparent that following the agent's testimony concerning Preston Jackson's involvement in the food stamp sales scheme with petitioner, the district court made a determination that a sufficient foundation had been established to warrant admitting testimony concerning his declarations.

error of court in making threshold finding admitting conspirators statement rendered harmless because conspiracy was subsequently established); *United States* v. *Richardson*, 694 F.2d 251, 254 (11th Cir. 1982) (trial judge did not abuse discretion in denying hearing on admissibility of co-conspirator statements outside presence of jury; sufficient foundation evidence subsequently introduced and defendant made no claim of prejudice).

b. Nor is there any substance to petitioner's argument (Pet. 15-18) that, under this Court's decision in *Jackson* v. *Denno*, 378 U.S. 368 (1964), due process considerations require that evidence bearing upon the admissibility of the statements of co-conspirators be received outside the presence of the jury.[9] In *Jackson*, 378 U.S. at 376-377, the Court held that, at some stage of a criminal proceeding, the defendant has the right to have the voluntariness of his confession determined by the court out of the presence of the jury. See also *Sims* v. *Georgia*, 385 U.S. 538, 543-544 (1967); 18 U.S.C. 3501(a) (hearing on voluntariness must be held out of the presence of the jury). The *Jackson* Court struck down the New York procedure under which the jury returned a general verdict after being called upon to decide both the issue of voluntariness and the issue of guilt. Under this procedure, the Court noted (378 U.S. at 380), there was no way of knowing what decision the jury had reached regarding the voluntariness of the confession—or indeed whether the jury had reached any decision at all on that issue. The Court also concluded (*id.* at 380-387) that this procedure created an unacceptable risk that the jury's decision on voluntariness might be influenced by its belief that the confession was true. Finally, the Court reasoned (*id.* at

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[9]By contrast with this claim, petitioner argued that the jury should have made the determination whether to admit the statements of the co-conspirators (see Pet. App. 2; Appellant's Br. 45-49).

388-391) that even if the jury found that the confession was involuntary and should not be considered, there was too much danger that the confession might nevertheless affect the verdict.

No similar problems are created by the procedure for admitting co-conspirator statements under Fed. R. Evid. 801(d)(2)(E). The question of the admissibility of co-conspirator statements is decided solely by the court, not the jury, and is made on the record, not subsumed by a general verdict. The only situation in which the introduction of co-conspirator statements might arguably be compared to that in *Jackson* would be where co-conspirator statements are introduced on condition that the foundational requirements later be met, those requirements are not in fact satisfied, and the jury is thereupon instructed to disregard the statements. Since that situation did not occur here, it need not be considered. Moreover, even where that situation does occur, analogy to *Jackson* is weak because the prejudicial impact of a convincing but involuntary confession is far greater than that of out-of-court statements that are shown by the evidence not to have been made by a co-conspirator during and in furtherance of the conspiracy.

Finally, this case presents no occasion for the Court to determine the proper procedure to be followed by a district court where the defendant wishes to present testimony concerning the admissibility of the statements of a co-conspirator but to avoid testifying as to such matters in the jury's presence. Although petitioner now maintains (Pet. 18) that he was not afforded an opportunity to testify "and to present his version or contentions with respect to a lack of the elements necessary to establish a foundation to admit co-conspirator's statements," he made no such request in the district court; nor did he proffer the testimony that he now claims he would have presented. Therefore, this issue

was not properly preserved for resolution on appeal. See Fed. R. Evid. 103(a)(2); see also *Luce* v. *United States,* No. 83-912 (Dec. 10, 1984), slip op. 4.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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